Supreme Court, U.S.
FILED

93 1 1 7 6 JAN 1 8 1994

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

EDITH FONTENOT,

Petitioner

versus

STATE OF TEXAS,

TEXAS DEPARTMENT OF HUMAN SERVICES,

JUDY VAN HOOSER,

HERBERT D. KNEISLEY,

DAVE ENGLAND,

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

Edith Fontenot
PRO SE, PETITIONER
P.O. Box 16444
Austin, TX 78761
(512) 452-6321

69 pp

QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in affirming the district court's judgment issued September 1, 1993?

2. Whether the district court erred in granting summary judgment for defendants?

3. Whether the district court erred in its failure to give plaintiff notice to come forward with all supporting evidence?

4. Whether the court erred in its failure to consider the incorrect dates given by the defense attorney of the unlawful acts that are the subject of this case?

5. Whether the court erred in its failure to recognize that plaintiff had met the criteria for establishing a prima facie case of discrimination and retaliation according to McDonnell Douglas?

6. Whether the court erred in recognizing that disparate treatment is unlawful?

7. Whether the court erred in requiring that the plaintiff respond to summary

judgment within ten (10) days after receipt of defendants' answers (approximately 2,000 pages in length) to plaintiff's interrogatories?

8. Whether the court failed to rule on summary judgment in a manner consistent with the ruling issued by the Third Circuit in Frederick Hart & Co., Inc. v. Recordgraph Corp., 169 F.2d 580 (1948), and Fairbanks Morse & Co. v. Consolidated Fisheries Co., 190 F.2d 817, 824?

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STATE OF TEXAS,

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FOR THE FIFTH DISTRICT

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OPINIONS BELOW

The petitioner, Edith Fontenot, respectfully petitions for a Writ of Certiorari to review the judgment rendered by the Fifth Circuit affirming the district court's judgment.

Judgment denying petition for rehearing, filed October 18, 1993, is reproduced in Appendix A.

Judgment of the Fifth Circuit affirming the district court's judgment, filed September 1, 1993, is reproduced in Appendix B.

Judgment of the district court granting summary judgment, filed November 19, 1992, is reproduced in Appendix C.

Judgment of the district court denying plaintiff's motion to vacate summary judgment, filed on January 20, 1992, is reproduced in Appendix D.

Judgment of district court granting plaintiff's motion to reopen discovery, filed August 28, 1992, is reproduced in Appendix E.

Judgment of Fifth Circuit affirming in part and vacating in part the judgment of the district court, filed April 26, 1990, is reproduced in Appendix G.

Judgment of district court granting defendants' motion to dismiss, filed September 11, 1989, is reproduced in Appendix H.

JURISDICTION

Jurisdiction of this Court is found under 28 U.S.C. § 1291.

Jurisdiction for the district court is found under 28 U.S.C. §1343.

Judgment sought to be reviewed was entered on September 1, 1993.

Petition for rehearing was denied on October 18, 1993.

STATUTES INVOLVED

42 U.S.C. § 1981. Equal rights under the law (see Appendix I).

42 U.S.C. §1983. Civil action for deprivation of rights (see Appendix I).

42 U.S.C. § 1985. Conspiracy to interfere with civil rights; (3) Depriving persons of rights or privileges (see Appendix I).

F.R.C.P. 56, 1963 Amendment.

Subdivision (e) (see Appendix I).

STATEMENT OF THE CASE

Plaintiff, a black female, is a citizen of the United States of America and was employed by the State of Texas Department of Human Services in Travis County, Texas. In October 1985, plaintiff sought to be promoted to a better position with defendant, Texas Department of Human Services, as a division administrator. In November 1985, the defendant refused to interview plaintiff for the position applied for in October. In February 1986, defendant willingly failed and refused to hire plaintiff for position applied for in October 1985, although the plaintiff was fully qualified. The defendant filled the position with a white employee (Civil Action A-87-CA-749). Throughout the course of this case plaintiff has established a prima facie case of discrimination as

required by McDonnell Douglas. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

The action arose under the United States Constitution, particularly under the provisions of the Thirteenth and Fourteenth Amendments, and under federal law, particularly under Title 42, United States Code, Sections 1981, 1983, 1985. This action is based on acts of racial discrimination by defendants against plaintiff. In bringing this action plaintiff sought compensatory and punitive relief. The case was never heard by a jury, as requested by plaintiff. The case was dismissed by the Honorable Judge James R. Nowlin of the United States District Court for the Western District of Texas. Judgment was entered on September 11, 1989, and plaintiff filed a notice of appeal on October 11, 1989. The case was remanded in part back to the district

court. The district court granted summary judgment in favor of defendants on November 19, 1992. On September 1, 1993, the Fifth Circuit affirmed the district court's judgment.

REASONS FOR GRANTING THE WRIT

Defendants' use of racial discrimination in their hiring and promotional practices violate the plaintiff's constitutional rights. These rights are protected under Title 42, United States Code, §§ 1981, 1983, 1985.

The plaintiff has established a prima facie case of discrimination as required by Douglas. Plaintiff also provided facts and instances where plaintiff was continuously treated differently from other white employees. Plaintiff cited instances where she filed complaints of discrimination with various agencies (in house complaints, and complaints with the EEOC). Because plaintiff

has established a prima facie case of racial discrimination and because intent and motives are involved, it was inappropriate for the court to dispose of this case through summary judgment in favor of defendants.

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986), requires that the losing party to a summary judgment receive notice that the party must come forth with all of its supporting evidence. Plaintiff was never informed by the court that plaintiff was required to do this. In a response to a motion filed by plaintiff, the court ordered defendants to fully comply with plaintiff's discovery requests and to fully supplement any earlier discovery requests by September 15, 1992. In the same order the court also ordered plaintiff to respond to Defendants' Motion for Summary Judgment by September 25, 1992.

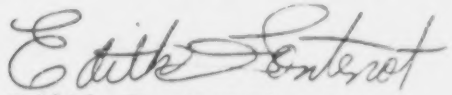
The Fifth Circuit ruled on summary judgment in a manner that is inconsistent with the Third Circuit. The court used dates that were misrepresented by defense attorney in ruling on time related issues.

Triable issues have been cited by plaintiff in amended complaint and responses to defendants' motions.

CONCLUSION

For the foregoing arguments, the judgment of the Fifth Circuit should be reversed and remanded to the district court to proceed with a jury trial.

Respectfully Submitted



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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8206

EDITH FONTENOT,
Plaintiff-Appellant,

versus

STATE OF TEXAS, ET AL.,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING
(October 18, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing field in the above entitled and numbered cause be the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8206
Summary Calendar

D.C. Docket No. A-87-CA-749-JN

EDITH FONTENOT,
Plaintiff-Appellant,

versus

STATE OF TEXAS, ET AL.,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the

costs on appeal to be taxed by the Clerk of this Court.

September 1, 1993

ISSUED AS MANDATE: OCT 28, 1993

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8206
Summary Calendar

EDITH FONTENOT,
Plaintiff-Appellant,

v.

STATE OF TEXAS, ET AL.,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas
(A 87 CA 749 JN)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Edith Fontenot sued the State of Texas, the Texas Department of Human Services (DHS), and DHS supervisors Herbert Kneisley, Dave England and Judy Van Hooser

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

in federal district court alleging that the defendants had discriminated against her on the basis of her race in violation of 42 U.S.C. §§ 1981, 1983, and 1985. The State of Texas and DHS were dismissed early on, a decision which we affirmed in an earlier appeal. Ultimately, the district court granted summary judgment in favor of Kneisley, England and Van Hooser. Fontenot appeals, and we affirm.

I. Background

Fontenot was hired by DHS in January of 1968 to work as a key punch operator. She was employed there in various capacities until February of 1990. During her tenure at DHS, Fontenot twice applied for supervisory positions: once in October of 1985, and again in May of 1988. In both instances, a white employee succeeded in receiving the position. As a result of the 1985 incident, Fontenot filed a complaint in district court in November of 1987. She

alleged that although she was fully qualified for the position, she had not even been interviewed for it because of her race. She asserted that five white applicants with lesser qualifications were interviewed instead. She further alleged that from December of 1974 to the time of filing, she had not received the same treatment as the white employees at DHS.

The defendants at the time (the State of Texas, DHS, Kneisley and England) moved to have the case dismissed. They asserted in part that the Eleventh Amendment barred the suit against the State and DHS, and that qualified immunity protected Kneisley and England from the action. Fontenot did not respond to the motion for dismissal, which the district court granted. Fontenot then moved to have the case reinstated. She asserted that she had not responded to the motion for dismissal because she had believed it appropriate to wait until the

district court had ruled on it. The district court granted her motion to reinstate and gave her fifteen days to respond to the defendants' motion to dismiss. After considering her response, the district court again dismissed the case, on Eleventh Amendment and qualified immunity grounds.

Fontenot appealed the dismissal of her complaint to this court on October 11, 1989. We upheld the dismissal of her claims against the State and DHS. However, we held that the district court should have instructed Fontenot to submit a detailed complaint alleging with particularity the facts she would use to demonstrate that Kneisley and England had acted outside the scope of their immunity. We accordingly remanded the claims against the individual defendants for further proceedings in accordance with our decision.

On remand, the district court instructed Fontenot to file additional

pleadings specifying the actions of Kneisley and England which fell outside the scope of their immunity. In her first and second amended complaints, Fontenot added Van Hooser to her list of defendants. She alleged that Van Hooser refused to promote her in May of 1988 because of her race and because she had filed previous complaints of discrimination. In support of her allegation that the refusal to promote her was race-based, Fontenot claimed that in the 1970's, Van Hooser had refused to give her a federal publication on policies relevant to her work that had been distributed to other employees. Van Hooser also allegedly refused to assign Fontenot to a position for which she had applied in 1981 and refused to post as available another position to which she promoted another employee. Finally, Fontenot asserted as proof of racial discrimination the fact that Van Hooser did not attend the dinner

given for Fontenot when she was eventually promoted to section director.

With regard to Kneisley, Fontenot alleged that he had refused to promote her in October of 1985 because of her race and because she had earlier filed complaints within DHS. In support of her allegation that the refusal to promote her was race-based, Fontenot asserted that in early 1974, after she allegedly because the only black programmer trainee at DHS, Kneisley refused to delegate projects to her, in spite of her repeated requests for assignments. She asserted generally that she worked with little or no supervision, while white programmers were directed by a project leader and a section director or project manager. Against England, Fontenot argued that he approved Kneisley's refusal even to interview her for the October, 1985 position.

After Fontenot filed her amended pleadings, the defendants moved for summary judgment. They asserted that all claims against England and Kneisley which arose before November 6, 1985, as well as all claims against Van Hooser which arose prior to June 8, 1988, were time-barred. In addition, they argued in part that Fontenot had not met her burden of establishing a genuine issue of material fact with regard to her claims against any of the defendants.

The district court granted summary judgment in favor of the defendants. It found that despite the reopening of discovery, Fontenot had shown no evidence supporting the allegations of her pleadings and had accordingly failed to establish a genuine issue for trial. Fontenot filed a motion to vacate the grant of summary judgment on the grounds that the district court had not informed her that she needed

to come forward with her supporting evidence at the time of the summary judgment hearing. The district court denied her motion. Fontenot appeals from the grant of summary judgment and the denial of her motion to vacate.

II. Discussion

A. Standard of Review

We review the district court's grant of summary judgment de novo, applying the same standard as a district court. See Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is proper only if the record discloses that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law. See Harbor Insurance Co. v. Trammell Crow Co., 854 F.2d 94, 98 (5th Cir. 1988) (quoting FED. R. CIV. PROC. 56(c)), cert. denied, 489 U.S. 1054 (1989). To defeat a motion for summary judgment,

the non-moving party must set forth specific facts sufficient to establish that there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); FED. R. CIV. PROC. 56(3). A mere allegation of the existence of a dispute is insufficient to defeat a motion for summary judgment. Anderson, 477 U.S. at 247-48. Moreover, the absence of evidence to establish an essential element of the non-moving party's case can support a summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In reviewing the record, this court is not bound to the grounds articulated by the district court and may affirm the grant of summary judgment on other appropriate grounds. See Harbor Insurance Co. v. Urban Construction Co., 990 F.2d 195, 199 (5th Cir. 1993); Coral Petroleum, Inc. v. Banque Paribas-London, 797 F.2d 1351, 1355 n.3 (5th Cir. 1986); Davis v. Liberty Mutual

Insurance Co., 525 F.2d 1204, 1207 (5th Cir. 1976).

B. The Claims Against Kneisley and England

On appeal, the defendants renew their assertion that all claims against defendants Kneisley and England which arose prior to November 6, 1985 are barred by the statute of limitations. It is well established that § 1981 claims and § 1983 claims are essentially claims for personal injury and are accordingly subject to a two-year statute of limitations under Texas law. See Hickey v. Irving Independent School Dist., 976 F.2d 980, 982 (5th Cir. 9292); see also Gartrell v. Gaylor, 981 F.2d 254, 256 (5th Cir. 1993); Price v. Digital Equipment Corp., 846 F.2d 1026 (5th Cir. 1988). The statute of limitations for § 1985 actions under Texas law is also two years. See Helton v. Clements, 832 F.2d 332, 334 (5th Cir. 1987). Because Fontenot

filed her original complaint against Kneisley and England on November 6, 1987, each of her claims that arose before November 6, 1985 is time-barred. A review of the record indicates that the last of her claims against Kneisley and England arose in October of 1985, when they allegedly denied her a promotion.[1] Accordingly, her entire cause of action against them is time-barred, and summary judgment was properly granted in their favor.[2]

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[1]It might be argued that overt acts pursuant to the conspiracy claim under § 1985 were committed after November 6, 1985. However, this court has held that § 1985 conspiracies accrue "as soon as [the] plaintiff knew or should have known of the overt acts involved in the alleged conspiracy." Helton, 832 F.2d at 335. Given the centrality of the alleged October, 1985 hiring incident to Fontenot's action, her § 1985 claim against Kneisley and England is time-barred.

[2]Even if Fontenot's claims against Kneisley and England were not time-barred, they would fail because Fontenot provided no evidence beyond her pleadings that a genuine issue existed for trial. See infra, Part II.C.

C. The Claims Against Van Hooser

Although the claims against Van Hooser are arguably not time-barred, she asserts that Fontenot failed to establish a genuine issue for trial and so the grant of summary judgment in her favor should be upheld. The Supreme Court has held that the moving party is a summary judgment proceeding need only need only "poin[t] out to the district court" that there is an absence of evidence to support the non-moving party's case. Celotex, 477 U.S. at 325. On the other hand, the non-moving party must "go beyond the pleadings and her own affidavits" and establish "specific facts showing that there is a genuine issue for trial" through such evidentiary materials as other affidavits, answers to interrogatories, and admissions. Id. at 324. In the case at hand, despite the reopening of discovery, Fontenot failed to assert any recognizable evidence in

opposition to Van Hooser's motion for summary judgment. Instead, she relied entirely on her earlier pleadings. Accordingly summary judgment was properly granted in Van Hooser's favor.

Fontenot argues that the district court's grant of summary judgment should be vacated because the district court should have informed her that she needed to present all of her evidence at the summary judgment proceedings. We disagree. The defendants' motion for summary judgment explained in detail the standard for summary judgment proceedings. It gave Fontenot adequate notice that she would need to present evidence pursuant to Federal Rule of Civil Procedure 56(e) to sustain her cause of action. Moreover, the district court reopened discovery prior to the summary judgment hearing at Fontenot's request to ensure that she had a full and fair opportunity to gather evidence.

Accordingly, her motion to vacate the grant of summary judgment was properly denied.

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's judgment.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

EDITH FONTENOT	§	
	§	
VS.	§	CIVIL NO.
	§	A-87-CA-749
STATE OF TEXAS, ET AL	§	

OPINION AND JUDGMENT

Before the Court is the Defendants' Motion for Summary Judgment, filed on May 29, 1992. Having required this motion, the response thereto, the applicable law, and the entire record of this case, this Court enters the following opinion and judgment.

Rule 56 of the Federal Rules of Civil Procedure establishes the procedural rules by which a party may seek summary judgment. Fed. R. Civ. P. 56. A claimant must wait twenty days from the commencement of the action to move for summary judgment, but a defendant may file a motion for

summary judgment at any time. Id. at (a) and (b). The summary judgment motion may, but need not be, accompanied by supporting affidavits. Id.

In three decisions rendered in 1986, the United States Supreme Court explained the legal standards applicable to summary judgment motions. See generally, Matsushita Electric Industrial Co., Ltd., v. Zenith Radio Corporation, 475 U.S. 574, 106 S.Ct. 1348 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986). The Supreme Court has emphasized:

> . . . the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

Anderson, 477 U.S. at 247-248, 106 S.Ct. at 2510 (emphasis in original). If a reasonable jury could return a verdict for

the nonmoving party, summary judgment is not appropriate. Id., 477 U.S. at 248, 106 S.Ct. at 2510. The Supreme Court explained:

> . . . Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S at 322, 106 S.Ct. at 2552. When deciding a summary judgment motion, the district court must view the inferences permissibly drawn from the underlying facts in the light most favorable to the party opposing the motion. Matsushita, 475 U.S. at 587, 106 S.Ct. at 1356.

Initially, the party moving for summary judgment has the burden of:

> . . . informing the district court of the basis for its motion, and identifying those portions of the "pleadings, depositions, and answers to interrogatories, and admissions on file, together with the

> affidavits, if any," which [the moving party] believes demonstrate the absence of a genuine issue of material fact. . . . [W]e find no express or implied requirement in Rule 56 that the moving party support its motions with affidavits or other similar materials negating the opponent's claim.

Celotex, 477 U.S. at 323, 106 S.Ct. at 2553. Pursuant to Rule 56, a motion for summary judgment may be made with or without supporting affidavits. Id., 477 U.S. at 324, 106 S.Ct. at 2553.

To meet its burden, the party seeking summary judgment must show that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325, 106 S.Ct. at 2554. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson, 477 U.S. at 249, 106 S.Ct. at 2511. To decide a motion for summary judgment, a trial court must apply the substantive evidentiary standard of

proof applicable at a trial. Id., 477 U.S. at 252, 106 S.Ct. at 2512.[1]

To oppose a properly supported motion for summary judgment, a party may not rely upon the mere allegations or denials of his or her pleadings. Anderson, 477 U.S. at 248, 106 S.Ct. at 2510. Instead, the opposing party must set forth specific facts to demonstrate that there is a genuine issue of material fact for trial. Id.; see also Matsushita, 475 U.S. at 585-6, 106 S.Ct. at 1355. Even if such evidence is likely to be within the possession of the defendant, a plaintiff must present affirmative evidence to defeat a motion for summary judgment, as long as the plaintiff has had a full opportunity to conduct discovery. Anderson,

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[1]Indeed, federal district courts possess the power to sua sponte enter summary judgment, so long as the losing party receive notice that the party had to come forward with all of its supporting evidence. Celotex, 477 U.S. at 326, 106 S.Ct. at 2554.

477 U.S. at 257, 106 S.Ct. at 2514. Such a plaintiff need only present evidence from which a reasonable jury might return a verdict favorable to the plaintiff. Id. (emphasis added).

The nonmoving party need not produce evidence in a form that would be admissible at trial to avoid summary judgment. Celotex, 477 U.S. at 324, 106 S.Ct. at 2553. Pursuant to Rule 56(e), the nonmoving party may oppose summary judgment motion with any of the evidentiary materials listed in Rule 56(c), including affidavits, depositions, answers to interrogatories, and admissions. See id.; see also Fed. R. Civ. P. 56(c) and (e). The Court has stated that:

> . . . Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Celotex, 477 U.S. at 324, 106 S.Ct. at 2553. Where the entire record could not let a reasonable jury to find for the nonmoving party, no "genuine issue for trial" exists. Matsushita, 475 U.S. at 587, 106 S.Ct. at 1356.

This Court recognizes the Plaintiff's contention that she has established a prima facie case of discrimination. However, the Plaintiff has failed to assert any recognizable evidence in opposition to the Defendants' motion for summary judgment. The Defendants have properly supported their summary judgment motion with a showing that there is no evidence to support the Plaintiff's claims. The Plaintiff has not met her burden to rebut these claims.

Partially to assist the Plaintiff in her ability to respond to the Defendants' motion for summary judgment, this Court reopened the discovery period in this

action, and this Court ordered the Defendants to properly and promptly comply with the discovery requests of the Plaintiff. The Court gave the Plaintiff adequate time to properly respond to the Defendants' motion for summary judgment, after this Court's discovery compliance deadline had passed. The Plaintiff has not made any allegations or charges that her discovery requests were not properly complied with.

In her response to the Defendants' motion for summary judgment, the Plaintiff does not make any assertion of disputed facts or evidence to support her claims. To adequately oppose a properly supported motion for summary judgment, the Plaintiff must do more than what she has done, relying on her earlier pleadings. Even though the Plaintiff has had a fair and full opportunity to conduct discovery, the Plaintiff has failed to present the affirmative evidence to successfully oppose the

properly supported motion for summary judgment of the Defendants. The Plaintiff has not referred to any of the evidentiary materials listed in Rule 56(c) to support her opposition to the Defendants' motion. The Plaintiff has failed to "designate specific facts showing that there is a genuine issue for trial."

This Court finds that the entire record could not permit a reasonable jury to find for the Plaintiff. The Defendants have not exceeded the limits of their qualified immunity. Further, the Plaintiff has failed to point to sufficient evidence to support her claimed deprivation of rights.

ACCORDINGLY, IT IS ORDERED that the Defendants' Motion for Summary Judgment, filed on May 29, 1992, is hereby GRANTED.

SIGNED AND ENTERED this 19th day of November, 1992.

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

EDITH FONTENOT	§	
	§	
VS.	§	CIVIL NO.
	§	A-87-CA-749
STATE OF TEXAS, ET AL	§	

ORDER

Before the Court is the Plaintiff's Motion to Vacate Summary Judgment, filed December 4, 1992. Having reviewed and considered this motion, the response, and the applicable law, this Court is of the opinion that this motion should be DENIED.

IT IS ORDERED that the Plaintiff s Motion to Vacate Summary Judgment, filed December 4, 1992, is hereby DENIED.

SIGNED AND ENTERED this 20th day of JANUARY, 1993.

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

EDITH FONTENOT	§	
	§	
VS.	§	CIVIL NO.
	§	A-87-CA-749
STATE OF TEXAS, ET AL	§	

ORDER

Before the Court are Plaintiff's Motion to Extend Time, filed June 16, 1992, and Plaintiff's Motion to Reopen Discovery, filed August 6, 1992. Having reviewed and considered these motions, the Court is of the opinion that they should be GRANTED as follows.

IT IS ORDERED that Plaintiff file her response to the Defendants' Motion for Summary Judgment no later than 5 p.m. on September 25, 1992. The Defendants may file a reply to any such response under the time limits set forth in the Local Rules.

IT IS FURTHER ORDERED that discovery in this case is reopened for the sole purpose that Defendants fully comply in good faith with Plaintiff's requests for production and interrogatories that were received by the Defendants on May 1, 1992. The Defendants shall have until no later than September 15, 1992, to fully comply with the Plaintiff's discovery requests and to fully supplement any earlier discovery requests.

SIGNED AND ENTERED this 20th day of JANUARY, 1993.

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

EDITH FONTENOT, Plaintiff,	§	
v.	§	CIVIL NO. A-87-CA-749
STATE OF TEXAS, TEXAS DEPARTMENT OF HUMAN SERVICES, JUDY VAN HOOSER, HERBERT D. KNEISLEY, DAVE ENGLAND, Defendants.	§	

MOTION TO REOPEN DISCOVERY

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME PLAINTIFF PRO SE EDITH FONTENOT AND FILE THIS MOTION TO REOPEN DISCOVERY. PLAINTIFF SERVED INTERROGATORIES ON TWO SEPARATE OCCASIONS TO DEFENDANTS ATTORNEY. THE RESPONSE TO THE FIRST SET OF INTERROGATORIES WERE OF LITTLE OR NO VALUE TO PLAINTIFF. PLAINTIFF WAS NOT FULLY AWARE OF THE FULL IMPACT OF THIS POOR RESPONSE UNTIL SHE STARTED PREPARING

HER PORTION OF THE PRETRIAL ORDER. DEFENDANTS ATTORNEY REFUSED TO RESPOND TO THE SECOND SET OF INTERROGATORIES BECAUSE THE DEADLINE FOR DISCOVERY EXPIRED ON APRIL 30, 1992. WHEN I MET WITH DEFENDANTS ATTORNEY ON APRIL 22, 1992, TO GIVE A DEPOSITION, I INFORMED HER AT THAT TIME THAT I WOULD BE SENDING HER MORE INTERROGATORIES.

I AM ATTACHING COPIES OF DEFENDANTS RESPONSES TO PLAINTIFF'S INTERROGATORIES.

RESPECTFULLY SUBMITTED

EDITH FONTENOT
PLAINTIFF PRO SE
P O BOX 16444
AUSTIN, TEXAS 78761
(512) 453-6321

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON THE 6TH DAY OF AUGUST, 1992, A TRUE AND CORRECT COPY OF THE ABOVE AND FOREGOING WAS SENT BY U.S. MAIL, CERTIFIED, RETURN RECEIPT REQUESTED TO THE FOLLOWING:

DONA G. HAMILTON
ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY
OF THE STATE OF TEXAS
P.O. BOX 12548, CAPITOL STATION
AUSTIN, TEXAS 78711-2548

EDITH FONTENOT
PLAINTIFF PRO SE

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-8010
Summary Calendar

D.C. Docket No. A-87-CA-749

EDITH FONTENOT,
Plaintiff-Appellant,

versus

STATE OF TEXAS, ET AL.,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

Before CLARK, Chief Judge, WILLIAMS and DUHE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in

this cause is affirmed in part and vacated in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellant pay to the defendants-appellee the costs on appeal to be taxed by the Clerk of this Court.

April 26, 1990

ISSUED AS MANDATE: MAY 18, 1990.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-8010
Summary Calendar

EDITH FONTENOT,
Plaintiff-Appellant,

versus

STATE OF TEXAS, ET AL.,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas
(A-87-CA-749
(April 26, 1990)

Before CLARK, Chief Judge, WILLIAMS and DUHE, Circuit Judges.

PER CURIAM:*

Edith Fontenot appeals pro se the district court's dismissal of her action

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

brought under 42 U.S.C. §§ 1981, 1983, and 1985 against the State of Texas, the Texas Department of Human Services [the Department], Herbert D. Kneisley and Dave England. The district court dismissed the action against all defendants. That dismissal was correct as to the State of Texas and the Department. However, because the court failed to demand from Fontenot a particularized statement of facts sufficient to overcome the qualified immunity defense asserted by Kneisley and England, we vacate the judgment as to those two defendants and remand with directions.

I

Fontenot's complaint alleged: that in October 1985 she sought a promotion to the position of Division Administrator with the Department; that she "was fully qualified for it in her background and training"; that Kneisley, with Dave

England's approval, willfully refused to interview her for the position solely because she was black; that they interviewed five less qualified white applicants; and that a white person was hired for the job.

The defendants filed a combined answer and motion to dismiss claiming that the state, the Department, and Kneisley and England in their official capacities were all immune from suit by virtue of the eleventh amendment. In their individual capacities, Kneisley and England contended that a section 1985 action for conspiracy cannot be brought against individuals who work for the same agency. Kneisley and England also argued that they were qualifiedly immune from suit because they were acting in their official capacities "within a reasonable good faith belief that their actions were proper under the constitution and laws then in existence,"

and that Fontenot had failed to state a constitutional claim capable of overcoming the defense.

In March 1988 the district court granted the defendants' motion to dismiss, noting that Fontenot had failed to respond to it. Fontenot then filed a motion to reinstate the action because she did not understand that she would not have another opportunity to respond to any adverse ruling by the court. The district court granted Fontenot's motion to reinstate, ordering her to demonstrate to the court within 15 days why the action should not be dismissed according to the defendants' motion to dismiss. Fontenot then filed a response alleging, without offering supporting facts, that Kneisley and England were not qualifiedly immune, and arguing that her complaint should not be dismissed for failure to state a claim unless she

could prove no set of facts upon which relief could be granted.

The district court again dismissed the action, holding that the state and the Department were immunized by the eleventh amendment and that Fontenot failed to plead with sufficient particularity facts indicating that the individual defendants' acts were outside the scope of immunized conduct.

II

Fontenot contends that the district court failed to apply the correct legal standard to determine whether Kneisley and England are entitled to qualified immunity. We disagree. The district court relied on Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), for the proposition that state officials are entitled to immunity from suit unless they have violated "clearly established statutory or constitutional rights of which a reasonable

person would have known." Harlow, 457 U.S. at 818. The Supreme Court's most recent pronouncement on immunity, Anderson v. Creighton, 107 S. Ct. 3034 (1987), reaffirmed that the Harlow standard controls the question of qualified immunity. The district court applied the correct standard.

III

Fontenot also argues that the district court misapplied our decision in Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985). She urges that in a case such as hers the district court can find the complaint wanting in supporting facts. We agree.

In cases where the defense of immunity is asserted, courts must balance the liberal notice pleading requirements of the Federal Rules of Civil Procedure with the right of public officials acting in their official capacities to be free of

harassing legal actions. Morrison v. City of Baton Rouge, 761 F.2d 242, 244 (5th Cir. 1985) (per curiam). Thus, the court can require that complaints in cases where immunity is pled state specific facts, not mere conclusory allegations, which if proven would overcome the defense. Elliott, 751 F.2d at 1482. The district court therefore could correctly determine that Fontenot's complaint and response to the defendants' motion to dismiss were deficient because they contained only conclusory allegations.

The district court, however, failed to consider a further requirement of Elliott. In Elliott, the complaint contained conclusory allegations that the defendants, a state judge and prosecutors, had conspired to deprive the plaintiffs of their federal civil rights. The district court granted judgment in favor of most of the defendants on the basis of qualified immunity.

On appeal, we vacated and remanded, holding that

> Once a complaint against a defendant state legislator, judge, or prosecutor (or similar officer) adequately raises the likely issue of immunity--qualified or absolute--the district court should on its own require of the plaintiff a detailed complaint alleging with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained.

Ibid (emphasis added). "The trial judge may not wait on motions or other actions by the parties or counsel." Id. at 1480.

We further developed the contours of a district court's Elliott obligation in Morrison v. City of Baton Rouge, supra, and in Jacquez v. Procunier, 801 F.2d 789 (5th Cir. 1986). In Morrison, the district court never explicitly ordered the plaintiffs to amend the complaint to plead specific facts. However, the plaintiffs over a three-year period conducted discovery and amended their complaint on

their own to allege specific facts. 761 F.2d at 245-46. We determined that the plaintiffs had presented their "best case" for demonstrating that the governmental defendant had acted outside the scope of his immunity. Id. at 246. Thus, even though the district court had not specifically demanded more particularized allegations, we held that the Elliott standard was satisfied.

In Jacquez, the plaintiff did not file an amended complaint nor did the district court demand that he do so. 801 F.2d at 793. However, in a response to the defendants' motion to dismiss the plaintiff conducted "an extensive treatment of the Elliott pleading requirements." Ibid. As in Morrison, we determined that the plaintiff had pleaded his "best case" to overcome the Elliott pleading threshold. Ibid.

In the instant case, the district court, after dismissing once, granted Fontenot's motion to reinstate her suit and ordered he to respond to the motion to dismiss. However, the court neither expressly nor by reference or implication demanded of the plaintiff that she submit a statement of facts of sufficient specificity to overcome the individual defendants' pleadings argued that Fontenot's filings failed to plead with the particularity required by Elliott. Nor does the record establish that Fontenot on her own complied with the Elliott requirement. Until her brief on appeal she neither discussed Elliott nor did she plead facts on a level of specificity above that of conclusory allegations. We cannot say that Fontenot has yet pleaded her best case.

IV

On remand the district court should require from Fontenot an amended complaint

or such other statement as the court may direct that will demonstrate facts pointing to specific conduct of Kneisley and England which falls outside the scope of their qualified immunity. If Fontenot's submission fails to allege facts of such specificity, the court may then dismiss the action.

The judgment of the district court is affirmed as to the State and the Department. As to Kneisley and England, the judgment is vacated and the case is remanded for further proceedings.

AFFIRMED in part and,
VACATED in part, and
REMANDED with directions.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

EDITH FONTENOT	§	
	§	
VS.	§	CIVIL NO.
	§	A-87-CA-749
STATE OF TEXAS, ET AL	§	

ORDER

Before the Court is the Defendants[']
Motion to Dismiss. The Court, having considered the Motion, as well as the Plaintiff's Response, is of the opinion that the Motion is meritorious and should be granted.

Insofar as the Motion to Dismiss requests dismissal for Eleventh Amendment Reasons, the Motion is meritorious as to the State of Texas and the Department of Human Services. There is no question that the State is entitled to immunity, and as an arm of the State, the Department of

Human Services is also entitled to that immunity. See Clark v. Tarrant County, Texas, 798 F.2d 736 (5th Cir. 1986).

Likewise, on the qualified immunity issue, the Motion is valid. State officials are entitled to immunity from liability, unless they violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). See also Scheurer v. Rhodes, 416 U.S. 232, 247-48 (1974). In order to avoid this qualified immunity, the Plaintiff must plead with particularity, alleging facts sufficient to show that a Defendant's acts were outside the scope of his immunized conduct. Elliot v. Perez, 751 F.2d 1472 (5th Cir. 1985). The Plaintiff must make more than conclusory allegations or use "buzzwords" to avoid dismissal on these grounds. Jacquez v. Procunier, 801 F.2d 789 (5th Cir. 1986).

Plaintiff has not carried her pleading burden under Elliot. The fact that Plaintiff is proceeding pro se does not alter this conclusion. The record reflects that this action was dismissed initially because of the lack of a response to the Motion to Dismiss. The Plaintiff then requested that the Court reinstate the case, and give her an opportunity to file a response. The Court did so, and the response does not solve the immunity problem. A pro se Plaintiff does not have "a license not to comply with relevant rules of procedural and substantive law." Faretta v. California, 422 U.S. 806, 845 n.46 (1975). The Court has given the Plaintiff enough opportunities to cure the defects in her complaint, and they have not been cured. The Court will therefor dismiss the action against the individuals on immunity grounds.

ACCORDINGLY, IT IS ORDERED that the Defendants' Motion to Dismiss is GRANTED, and this action is dismissed because of the Defendants' sovereign and good faith immunity.

SIGNED AND ENTERED this 11th day of September, 1989.

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX I

42 U.S.C. § 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

42 U.S.C. § 1985. Conspiracy to interfere with civil rights; (3) Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State of Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth is this section, if one or more persons engage therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. § 1980.

F.R.C.P. 56, 1963 Amendment

Subdivision (e). The words "answers to interrogatories" are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing themotion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at leat if the averments are "well-pleaded," and not suppositious, conclusory, or ultimate. See Frederick Hart & Co., Inc. v. Recordgraph Corp., 169 F.2d 580 (3d Cir. 1948); United States ex rel. Kolton v. Halpren, 260 F.2d 590 (3d Cir. 1958); United States ex rel Nobles v. Ivey Bros. Constr. Co., Inc., 191 F. Supp. 383 (D. Del. 1961); Jamison v. Pennsylvania Salt Mfg. Co., 22 F.R.D. 238 (W.D. Pa. 1958). . . .